Supreme Court, U.S.
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No. 97-488

In The

Supreme Court of the United States

October Term, 1997

DONALD C. SCHIRM,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT EXERCISE ITS DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI WHEN NO RULE 10 GROUNDS FOR GRANTING THE PETITION EXIST AND WHEN THE NATIONAL MEDIATION BOARD PUBLIC LAW BOARD NO. 5595 DID NOT EXCEED ITS JURISDICTION IN ENTERING AWARD NO. 32, DOCKET 32?

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I.

STATEMENT OF THE CASE

National Mediation Board Public Law Board No. 5595 entered Award No. 32, Docket 32 (Appendix to Petition for Writ, page 1), pursuant to the Railway Labor Act, 45 U.S.C. § 153, First (q), ruling that Petitioner Schirm was not entitled to Appendix D benefits under the applicable Collective Bargaining Agreement. Petitioner Schirm commenced this action for judicial review of Award No. 32 in the United States District Court for the Southern District of Iowa. Pursuant to Rule of Civil Procedure 73, the parties consented to the exercise of civil jurisdiction over the case by Magistrate-Judge John Jarvey who upheld Award No. 32. The parties had also consented to the Optional Appeal Route under Rule of Civil Procedure 73(d) and Magistrate-Judge Jarvey's Ruling was affirmed by United States District Judge Michael Melloy. Schirm then filed a Petition for Permission to Appeal to the United States Court of Appeals for the Eighth Circuit pursuant to Rule of Civil Procedure 73(d). The Eighth Circuit Court of Appeals' July 23, 1997 Judgment denied Schirm's Petition for Permission to Appeal. (Appendix to Petition for Writ, p. 18).

Petitioner Schirm claims that his job as a Single Track Operator existed more than eight months, was then abolished, and that he is therefore entitled to Collective Bargaining Agreement, Appendix D, benefits. A Single Track Operator protects maintenance of way crews working on track projects during the construction season from dangers of train traffic. The National Mediation Board Public Law Board No. 5595 in Award No. 32, Docket No. 32,

ruled that the parties to the Collective Bargaining Agreement never intended Appendix D benefits to apply to Single Track Operator jobs, which on this (northern) railroad have always begun and ended with the construction season. The Board found:

> The record before this Board supports a showing that a single track assignment has historically been a "seasonal assignment." Single track positions are established to provide protection for maintenance of way workers during the construction season.
>
> Appendix "D" of the controlling Agreement clearly states that the abolishment of a seasonable position will not result in protection for the employee affected. While there is some question in this record whether the assignment worked by Claimant was in existence beyond an "eight month duration," this would not change the fact that a Single Track assignment is, and has always been accepted by the parties as a seasonal position on this Carrier.
>
> Claimant, as the occupant of a seasonal position is, therefor, not entitled to the protective benefits requested. His claim is denied.

(Appendix to Petition for Writ, pp. 2-3).

II.

ARGUMENT

A. THERE IS NO IMPORTANT FEDERAL MATTER RAISED BY SCHIRM'S PETITION FOR WRIT OF CERTIORARI.

The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 111 S. Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991). Supreme Court Rule 10 sets out three basic grounds that may compel this Court to exercise its discretion to grant a petition for writ of certiorari. Schirm's Petition for Writ of Certiorari embodies none of these grounds. The proceedings below involve no important question of federal law that has not been, but should be, settled by this Court; and the Eighth Circuit Court of Appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court or that conflicts with the decision of another United States Court of Appeals on an important matter. The Eighth Circuit Court of Appeals' Judgment is unreported, as are the Opinions of United States District Judge Michael Melloy and United States Magistrate-Judge John Jarvey.

Further, the Judgment of the Eighth Circuit Court of Appeals does not decide any federal question but only states that Court's refusal to exercise its discretion under Rule of Civil Procedure 73(d) to hear an appeal of Judge Melloy's Ruling. The Eighth Circuit Court of Appeals'

Judgment is at the opposite pole from an important federal question. Petitioner Schirm consented to the Optional Appeal Route of RCP 73(d). The Advisory Committee Notes to RCP 73(d) state:

> This optional appellate route was provided by Congress in recognition of the fact that not all civil cases warrant the same appellate treatment.

At page 12 of Schirm's Petition for Writ of Certiorari, he complains that language from the opinion of United States District Court Judge Melloy conflicts with the decisions of *all circuit courts of appeal including the Eighth Circuit*. A conflict between a United States District Court decision and decisions of circuit courts of appeal does not merit the grant of a petition for writ of certiorari.

Petitioner Schirm's statement of the Questions Presented shows conclusively that his Petition should not be granted. Petitioner Schirm's Questions Presented (Petition for Writ, p. i) state that the rule of law allowing the use of course of dealing evidence to interpret a contract was erroneously applied in proceedings below. Petitioner Schirm's other complaint is that Public Law Board No. 5595 made erroneous fact findings when it failed to find that the Single Track Operator position had been in existence more than eight months before it was abolished. (Petition for Writ, p. 5). Supreme Court Rule 10 instructs:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

These are the precise types of errors asserted here by Petitioner.

B. THE NATIONAL MEDIATION BOARD PUBLIC LAW BOARD NO. 5595 DID NOT EXCEED ITS JURISDICTION WHEN IT ENTERED AWARD NO. 32, DOCKET 32, AND THE COURTS' RULINGS DENYING PETITIONER'S APPEALS WERE CORRECT IN UPHOLDING THE BOARD'S AWARD.

The correct standard of review of a Railway Labor Act arbitration award is explained in *Union Pacific R.R. Co. v. United Transportation Union* [Gray], 23 F.3d 1397, 1399 (8th Cir. 1994):

> The scope of judicial review of arbitration awards under the Railway Labor Act is " 'among the narrowest known to the law.' " *International Assn' of Machinists v. Northwest Airlines*, 858 F.2d 427, 429 (8th Cir. 1988) (*quoting Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)). The Act provides that courts may set aside board orders on three grounds: (1) failure of the board to comply with the requirements of the Act; (2) failure of the board's order to confine itself to matters within the scope of the board's jurisdiction; and (3) fraud or corruption. *See* 45 U.S.C. Sec. 153, First (q); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 99 S. Ct. 399, 402, 58 L.Ed.2d 354 (1978) (per curium). . . .
>
> A public law board award is enforceable as within the scope of the board's jurisdiction unless the award is " 'without foundation in reason or fact.' " *International Ass'n of Machinists*, 858 F.2d at 430 (*quoting Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 414 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 90 S. Ct. 564, 24 L.Ed.2d 500 (1970)). In determining whether the Board exceeded its authority, "the

> agreement must be broadly construed with all doubts resolved in favor of the [Board's] award." *Walsh v. Union Pacific R.R.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 482 U.S. 928, 107 S. Ct. 3213, 96 L.Ed.2d 699 (1987). "Ambiguities in the opinion accompanying an award are normally not a reason for refusing to enforce an award." *Id.* Further, the " 'test of the Board's jurisdiction is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract.' " *Brotherhood of Ry., Airline & Steamship Clerks v. Kansas City Terminal Ry.*, 587 F.2d 903, 906-07 (8th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S. Ct. 1997, 60 L.Ed.2d 376 (1979) (*quoting Diamond*, 421 F.2d at 233).

Public Law Boards must take account of implied terms of collective bargaining agreements that are the product of long-standing concurrence of the railroad and union. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 312, 109 S. Ct. 2477, 105 L.Ed.2d 250, 267 (1989) (holding that employees disputing Conrail's unilateral decision on drug testing based on an implied term in the Collective Bargaining Agreement must use Railway Labor Act arbitration as their exclusive remedy); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 442 F.2d 251, 254-255 (8th Cir. 1971), *cert. denied*, 404 U.S. 871, 92 S. Ct. 70, 3 L.Ed.2d 116 (1971). The United States Supreme Court in *Consolidated Rail*, at 109 S. Ct. 2485, described the necessity and importance of an arbiter's knowledge of and enforcement of implied collective bargaining agreement terms:

> This case, then, turns on whether the inclusion of drug testing in periodic and return-from-leave physical examinations is arguably justified by the parties' collective-bargaining agreement. Neither party relies on any express provision of the agreement; indeed, the agreement is not part of the record before us. As the parties acknowledge, however, collective-bargaining agreements may include implied, as well as express, terms. *See, e.g., Northwest Airlines, Inc. v. Air Line Pilots Assn. Int'l*, 442 F.2d 251, 253-254 (CA8), *cert. denied*, 404 U.S. 871, 92 S. Ct. 70, 30 L.Ed.2d 116 (1971). Furthermore, it is well established that the parties' "practice, usage and custom" is of significance in interpreting their agreement. *See Transportation Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 161, 87 S. Ct. 369, 371, 17 L.Ed.2d 264 (1966). This Court has observed: "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. ' . . . [It] is a generalized code to govern a myriad of cases [491 U.S. 312] which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant.' " *Id.*, at 160-161, 87 S. Ct., at 371 (citation omitted) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S., at 578-579, 80 S. Ct., at 1350-1351).

The Appendix D agreement was executed April 26, 1972. The Public Law Board found that historically Single Track Operator jobs were seasonal. This was true long before Appendix D was executed as well as after its

execution. It was not the intention of the parties to provide Single Track Operator jobs Appendix D benefits. The Board so found based on the long-standing practice of the Railroad and the Union.

Additionally, the Record provided to the United States District Court Clerk by the National Mediation Board shows in Carrier's Exhibit A (Respondent's Appendix, p. 1, Carrier's Exhibit A, October 5, 1994 letter from F.J. Patitucci) that the 1993 Flood in Iowa caused the abolishment of the job for two weeks in July 1993 and thus supports the Board's failure to make a finding that the assignment worked by Mr. Schirm had been in existence beyond eight months.

Schirm contends the Public Law Board made erroneous fact findings in its Award denying Schirm Appendix D benefits. Schirm's Petition for Writ of Certiorari relies on the misconception that accepted common law rules for enforcement of private contracts govern enforcement of collective bargaining agreements under the Railway Labor Act and that such a rule was misapplied in this case. Although Public Law Board arbiters are chosen for their knowledge of the railroad industry, Petitioner Schirm contends they exceed their authority when they make use of that knowledge in making fact findings.

III.

CONCLUSION

There is no important federal matter raised by Schirm's Petition for Writ of Certiorari. The Ruling of the Eighth Circuit Court of Appeals was only a decision not

to exercise its discretion to hear an appeal of the decision of United States District Judge Melloy. Schirm's Petition (at p. 12) complains only that the opinion of Judge Melloy conflicts with the decisions of all circuit courts of appeal including the Eighth Circuit. Further, Magistrate-Judge Jarvey's Ruling and United States District Judge Melloy's Ruling on Appeal correctly held that the Public Law Board did not exceed its jurisdiction. Therefore, Respondent Union Pacific Railroad Company seeks as relief from this Court a denial of Schirm's Petition for Writ of Certiorari.

Respectfully submitted,

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RESPONDENTS' APPENDIX

CARRIER'S EXHIBIT A

Chicago and North Western
Transportation Company

[LOGO]

One North Western Center
Chicago, Illinois 60606

Labor Relations Department

October 5, 1994

Mr. Sam Siriano
414 North Orleans Street
Suite 304
Chicago, IL 60610

Reference: TCU File No. 17-94-APP. D-79
C&NW File No. 78-94-79
Appeal Dated August 17, 1994

Dear Sir:

Please refer to the above-identified case described by you as follows:

> " . . . claim in behalf of Mr. Donald C. Schrim for Appendix D benefits (furlough allowance and 12 per cent of the fair market value for sale of home). Initial request's were denied on dates of February 4, 1994 and February 21, 1994."

Claimant was in a voluntary furlough state at his headquarters point of Cedar Rapids, Iowa. On March 22, 1993, claimant was awarded Position No. 933, seasonal single

track operator, at Marshalltown, Iowa. The position was abolished on December 9, 1993. A claim has been submitted for payment of a furlough allowance and for payment of the fair market value of Claimant's home on the basis that the carrier violated Appendix "D," contending that the single track operator position had been in existence for more than a total of eight months.

Claimant is not entitled to additional compensation as claimed. There is no dispute between the carrier and the Organization that single-track jobs on this property have historically been considered seasonal positions. Contrary to your position, single-track jobs are created to cover the construction season. Single-track jobs fall into the category as contemplated in Article 1 of Appendix D, Section C.

This fact notwithstanding, information furnished this office indicates that the position in question was not in existence for longer than a "total of eight months" as this position was abolished in the month of July for an approximate two-week period due to flooding in Iowa. This does not, however, negate the fact that, even if the position were in existence for beyond eight months, it is a seasonal position and has always been considered as such by both the carrier and the Organization.

Based on the fact that the position in question is a seasonal position, claimant would not be entitled to the benefits as requested under Appendix D of the TCU Agreement. In order to qualify for the benefits as requested in your appeal, claimant would have to be affected by the abolishment of a permanent position. Since this is not the case, claimant is not eligible for these benefits.

Based on the foregoing and for all reasons previously given, this claim must remain declined in its entirety due to lack of support from schedule rules and agreements.

Very truly yours,

/s/ FP 10/5/94
F. J. Patitucci
Labor Relations (Non-Operating)